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Globalization of Law, Politics, and Markets -- A European Perspective on Implications for Domestic Law

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A European Perspective on Implications for Domestic Law

The international system after the end of the Cold War has become vastly more complex in structure, tasks, and perceptions on the part of the old and the new international actors. Processes of globalization and internationalization as well as strong countervailing forces of old and new nationalisms are but three major facets of this new vexing complexity. If one sets out to assess the implications of the globalization of law, politics, and markets for domestic law and its adaptation to the new situation in the United States, in European countries, or within the European Community (EC), one must have a rather precise picture of what globalization of the respective subjects actually means, where it happens and to what extent. It is also necessary, however, to put the phenomenon of globalization into proper historic perspective in order to understand the causes and forces leading to processes of globalization within the international setting.

This article deals with the new complexities of the international system and, specifically, with aspects of globalization, in three steps. In the first section, it elaborates on the notion of globalization and on the international setting in which it does or does not take place. It then proceeds to describe and analyze some of the strategies, mechanisms, and instruments applied in the process of globalization in the areas of trade and the environment within the frameworks of the General Agreement of Tariffs and Trade (GATT), the Organization for Economic Cooperation and Development (OECD), and, of course, the European Community (EC).[1] The third and final section draws some conclusions from the preceding analysis, and it then gives some tentative answers as to where and how the process of globalization of law, politics, and markets can and must be strengthened, which changes or reforms in the domestic legal orders are necessary, and asks for a modification of traditional nation-state centered perceptions of international political, economic, and legal transactions, special attention being paid to United States—EC relations.

Countervailing forces: globalization, internationalization, re-nationalization

For more than a century an increasing number of hitherto domestic or national matters have become "internationalized," i.e., made the subject of bi- or multilateral cooperation, mostly in an institutionalized framework, a process that in a wider sense could be called internationalization.[2] In the more recent past, however, the term globalization has entered into the vocabulary of

[1] Interesting contributions to the globalization of markets are also made by the International Labour Organization and the Council of Europe, particularly in the field of promoting the movement of workers. Since this article focuses specifically on trade and the environment, the ILO and Council of Europe experience is not dealt with here.

[2] This term in international law originally had a narrower meaning, see Rüdiger Wolfrum, *Internationalization*, in 10 Encyclopedia of Public International Law 268 (R. Bernhardt et al. eds. 1987); for a historically oriented account of the process of internationalization in the broader sense, see G. Dahm, J. Delbrück & R. Wolfrum, I/1 Völkerrecht 11-14.

Globalization denotes a process of de-nationalization of clusters of political, economic, and social activities.

scholars as well as political practitioners.[3] Although it seems, at times, as if the new term is rather carelessly used as a trendy synonym for the word "internationalization," such interpretation of the term "globalization" would fall short of its distinct meaning. For instance, certain serious threats to the environment such as ozone layer depletion or climate change caused by the so-called "greenhouse effect" are of global rather than international concern since they affect humankind everywhere, regardless of national boundaries. Similarly, today's financial markets are globalizing rather than internationalizing (which they did in earlier decades) since, for instance, the movement of capital has largely become independent of the sovereign control of state agencies.[4] Thus, it seems that globalization as distinct from internationalization denotes a process of de-nationalization of clusters of political, economic, and social activities. Internationalization, on the other hand, refers to cooperative activities of national actors, public or private, on a level beyond the nation state but in the last resort under its control. Another difference between the two notions is that internationalization serves as a supplement to the nation-state's efforts to satisfy the needs of its people, i.e., the national interest, while—at least ideally—globalization is to serve the common good of humankind, i.e., for instance, the preservation of a viable environment or the provision of general economic and social welfare. In this sense, globalization is a normative concept since it is related to a value judgment, that the common good is to be served by measures that are to be subsumed under the notion of globalization. At the same time, one has to realize that globalization also signifies a factual process based on the dynamics of, for instance, the markets.

On the basis of the foregoing considerations, globalization as understood here may be defined as the process of de-nationalization of markets, laws, and politics in the sense of interlacing peoples and individuals for the sake of the common good. Internationalization, on the other hand, may be defined as a means to enable nation-states to satisfy the national interest in areas where they are incapable of doing so on their own. A short survey of the evolution of the international system during the last century will show that the two processes can be identified as consecutive stages in the development of the international system. But such a survey will also reveal that globalization and internationalization are still met by strong countervailing forces of old and new nationalisms, with the result that neither internationalization nor globalization may be understood as exclusive and dominant characteristics of the present international system. Particularly, globalization is neither a universal process nor is the concept universally applied. Nor is globalization involving all states and regions alike, nor is it global in the sense that all major aspects of political, economic, or social life are actually encompassed by the process.

The international community has been witnessing one of the most profound upheavals in the international system since the breakdown of the old Eurocentric order after World War I. The seemingly stable bipolar power structure dominating the post-World War II order, reinforced by or based on the ideological division between the Soviet-led socialist camp and the Western World, has vanished. The apocalyptic threat of nuclear annihilation of most of the "civilized world" has become remote or even eliminated altogether. Yet the international system is far from

[3] As early as 1943, Wendell Willkie in his farsighted book *One World* (1943) touched on the notion of globalization. However, the term became "common coin" after influential institutions such as the Club of Rome called attention to the global challenges posed by the ecological crisis. See, for instance, Dennis Meadows et al., *The Limits of Growth* (1972); The Global 2000 Report to the President: Entering the Twenty-First Century (1980). For a perceptive analysis of processes of globalization of international policies, see Dieter Senghaas, *Weltinnenpolitik—Ansätze für ein Konzept*, 47 Europa Archiv 643 (at 647-648) (1992).

[4] This was pointedly observed by Professor Bruce Markell during the Interdisciplinary Conference on the Globalization of Law, Politics, and Markets: Implications for Domestic Law Reform Celebrating the 150th Anniversary of the Indiana University School of Law–Bloomington, March 4-7, 1993.

entering the millennium of perpetual peace, general welfare, and universal observance of human rights. On the contrary: Although a number of serious regional conflicts have been eased in the wake of the end of the Cold War, other grave conflicts, such as in the Near East, persist with unpredictable implications for international peace and security, and a host of new, rather vicious conflicts have surfaced, e.g., ethno-nationalist struggles for political and religious self-determination as in the former Soviet Union and in the former Yugoslavia, but not confined to these areas.[5] The causes of these violent struggles are partly historically rooted, but they are also indicative of a new phenomenon that will have a strong impact on the future development of the international, nation-state-based system. Ethno-nationalism has re-emerged after the breakdown of the overarching power structures suppressing longstanding ethno-nationalist antagonisms. But today's ethno-nationalism has another, modern dimension to it. As people worldwide have become politically more conscious and, therefore, less ready to accept public authority as such, they are turning to measures of "self-help"—violently if necessary—and to religiously-based (mostly fundamentalist) group identification. As a result, we see the international system confronted with a fast growing diversity of political actors—new states and nations striving to become states—who are highly politicized and suspicious of public authority whether international or national. Tendencies of re-nationalization can also be observed even within well-institutionalized frameworks of supranational cooperation such as the EC.[6]

On the other hand, the network of international organizations, which started to be set up in the late 19th century and have continuously grown in numbers and scope of competence,[7] has largely remained intact. In fact, the central international organization, the United Nations, has been re-vitalized as a result of the end of the Cold War. It is well worth remembering that international organizations have their raison d'étre in the fact that states realized their structural inability as independent entities to satisfy the economic and security needs of their societies in a time that was characterized by dramatic technological and social change.[8] International organizations reflect the international community's resolve to take on international responsibility for the maintenance of international peace and security, the protection of human rights, economic and social welfare, international communication in the widest sense,[9] and cultural exchange. However, with the exception of the recent and, so far, unique phenomenon of supranational cooperation within the EC, exercising international responsibility in the fields named above remained, at least de facto, nation-state oriented. The decision-making rules continued to be based on the principle of sovereignty. Institutionalized international cooperation was perceived as an instrument to supplement national governments where they were unable to fulfill the domestic needs of their people, not as a means of serving the international community at large. States came to think internationally to a certain extent, but they did not yet think globally, nor did non-governmental actors.

However, the post-World War II era saw a gradual change. It is not by chance that the United Nations was empowered to take binding decisions

[5] On the character and causes of the new ethno-nationalism, see Dieter Senghaas, *Vom Nutzen und Elend der Nationalismen im Leben von Völkern*, in Aus Politik und Zeitgeschichte—Beilage zur Wochenzeitung Das Parlament B 31-32(1992) 23 (at 30-31), see also David Hamburg, *Ethnische Konflikte—Ursachen, Eskalation und präventive Vermittlung*, 48 Europa Archiv 117 (1993); Peter Coulmas, *Das Problem des Selbstbestimmungsrechts—Mikro-nationalismen, Anarchie und innere Schwächen der Staaten*, 48 Europa Archiv 85 (1993).

[6] The changed attitudes of the electorates in Denmark, France, and Germany toward greater integration of the EC into a union with a common currency are indicative of this trend of cherishing national sovereignty; see the report on the French referendum on the Maastricht Treaty and public opinion polls in the other states named, in *New York Times* of Sept. 21, 1992 A 1; the Danish electorate, which has rejected ratification of the Maastricht treaty by a small margin, may come out in favor of the treaty after some modifications accommodating Danish anxieties, but the majority again will most likely be marginal.

[7] See Dahm, Delbrück & Wolfrum, supra note 2, at 13-14.

[8] Dahm, Delbrück & Wolfrum, supra note 2, at 11-13.

[9] J. Delbrück, *International Communications and National Sovereignty: Means and Scope of National Control over International Communications (Sea, Land, and Air Traffic, Telecommunications)*, XV Thesaurus Acroasium 77 (1987); see also the earlier work by Charles Henry Alexandrowitz, *The Law of Global Communication* (1971). On the globalization of information policies and its impact on domestic law see Fred Cate, *Global Information Policymaking and Domestic Law*.

Underdevelopment has become a global problem of the first order.

against aggressor states under Chapter VII U.N. Charter, a rather dramatic move away from the pre-war credo of state sovereignty.[10] The global experience of the devastating effects of modern warfare, including the first uses of atomic weapons, induced the international community to re-think the century-old concept of state sovereignty and to begin to realize that international peace and security had become not only an international responsibility but also a universal or global responsibility, and they limited the principle of sovereignty accordingly. The East-West confrontation tended to cloud this historic shift of focus, but with the end of the Cold War the new perception has again become more clearly visible. And it has become reinforced for a number of reasons, which will now be set out.

Although the threat of nuclear annihilation as a result of a nuclear exchange between the superpowers is remote today, universal peace and security are still in jeopardy. Nuclear blackmail resulting from uncontrolled—and possibly uncontrollable—proliferation, grave environmental pollution as a means of warfare (the weapon of the disenfranchised of the world), and severe ethno-nationalist conflicts cannot any longer be perceived of in traditional terms of international security policies.[11]

The impoverishment of a large segment of the international community due to underdevelopment, which had already been recognized in the so-called North-South dimension, has become a global problem of the first order. Since the breakdown of the Soviet empire, underdevelopment has now also become a West-East phenomenon. Underdevelopment and increasing impoverishment of a great number of peoples start right at the Eastern borders of Central Europe.

With the overriding concern for the maintenance of international peace between the two major alliance systems under the leadership of the United States and the Soviet Union removed, the international community is gradually recognizing the existential threats to the survival of "Space Ship Earth" posed by the increasing destruction of the human environment. Ozone layer depletion, global warming, water pollution, soil and groundwater pollution, vast land areas irradiated by nuclear waste, etc., have reached dimensions that transcend the capabilities of individual states and at least regional organizations to cope with these threats. Yet they pose global threats. The close interrelatedness of environmental destruction and underdevelopment add to the global scope of these problems.

As a result of impoverishment, environmental destruction, and in a great number of cases ethno-nationalist conflicts, a fourth problem of global dimension has emerged, i.e., mass migration. Intracontinental and transcontinental migration has become a worldwide phenomenon that cannot be dealt with adequately in terms of refugee relief programs, of granting asylum, or of other traditional instruments of temporary applicability. Conservative estimates of the present migrations maintain that they are still but the proverbial tip of the iceberg.[12]

One certainly realizes that the preceding list of factors covers only the dark side of the matter. Despite, or rather because of this, the list enumerates factors strongly contributing to a globalization of perceptions and calling for what E.v. Weizsäcker has called "Erdpolitik" (earth policy)[13] or what I prefer to call "Weltinnen-

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[10] R. Hiscocks, *The Security Council. A Study in Adolescence* 55-56 (1973); Delbrück, Commentary on Article 25 no. 1, in Die Charta der Vereinten Nationen—Kommentar 375 (B. Simma ed. 1991).

[11] The new dimensions of future international peace policies are clearly set out in *Agenda for Peace—Preventive diplomacy, peacemaking and peace-keeping. Report of the Secretary General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992*, U.N. Soc. A/47/277 and S/24111; see also Boutros Boutros-Ghali, *Friedenserhaltung durch die Vereinten Nationen: Eine neue Chance für den Weltfrieden*, 48 Europa Archiv 123 (1993).

[12] On the phenomenon of the new mass migrations, see Eberhard Jahn, *Migration Movements*, 8 EPIL 377 (1985) with further references to earlier comprehensive works on the subject; for shorter accounts of recent developments in migration movements, see Stiftung Entwicklung und Frieden (ed.), *Globale Trends. Daten zur Weltentwicklung* (1991); Albert Mühlum, *Armutswanderung, Asyl und Abwehrverhalten. Globale und nationale Dilemmata*, in Aus Politik und Zeitgeschichte. Beilage zur Wochenzeitung das Parlament, B 7(1993) 3; Clemens Geißler, *Neue Völkerwanderungen in Europa*, 47 Europa Archiv 566.

[13] See Ernst v. Weizsäcker, *Erdpolitik. Ökologische Realpolitik an der Schwelle zum Jahrhundert der Umwelt*, 3rd updated edition (1992).

politik" (world interior policy)—a term I borrowed from C.F.v. Weizsäcker.[14] But it is also evident that the process of globalization with regard to the issues named largely occurs on the level of adhortation rather than in fact. The instances where globalization in the areas named has already entered the stage of realization, e.g., in the form of conventional international law (climate convention, ozone layer protection convention, ecological trade regulation) and its impact on domestic law, politics, and markets will be dealt with further down.[15]

There remains the question of where else and to what extent globalization has entered the real world of actual implementation. Here we are referred to a fifth set of factors that have contributed to a process of actual globalization, i.e, to the establishment of international and to some extent global (or de-nationalized) markets.

The grand vision of an international or world economic order based on the principles of non-discrimination and free trade backed by the foundation of an International Trade Organization, as it was enunciated at the Bretton Woods Conference, was never realized.[16] However, the pragmatic implementation of the General Agreement on Tariffs and Trade (GATT)[17] together with the establishment of the World Bank[18], the International Monetary Fund[19], and the Organization for Economic Cooperation and Development (OECD)[20] has contributed to the foundations of an international economic order that now also forms the basis of the ongoing globalization of the economic order.[21] But besides the basic framework of a non-discriminatory and free trade-oriented economic order, additional factors were necessary to start the process of globalization of markets, politics, and law. These factors are to be found in the technological evolution, or rather revolution, of transnational communication. The rapid advancement of air traffic has brought the economic community closer together than ever before. But much more important, the telecommunications revolution has truly globalized international markets, particularly financial markets. What happens at the Tokyo stock market is of instantaneous relevance in Frankfurt, London, and—with little delay—in New York. The movement of capital, once a matter of weeks or days, is a matter of seconds today. A domestic decision on interest rates in many cases immediately affects trade policies worldwide. This momentous acceleration of market transactions does not only amount to quantitative time savings. It is actually changing the market and the agents' behavior qualitatively. A third factor contributing to the globalization of markets, closely linked to the high international mobility of capital, goods, and services, is constituted by the emergence of transnational corporations.

However, here a caveat is necessary. We have to remember that this globalization is confined to the "sunny side of the globe": It is the globalization of markets within the framework of GATT and OECD and, to some extent, of the EC. The large rest of the world is either only loosely linked to the world of globalizing economies or left out altogether. The EC is a special case in this context. Certainly, the European Community constitutes a prime example of transcending the parochial perspective of narrow national markets. The completion of the internal market has created an extensive zone without internal tariffs and other barriers to free trade. In this sense the EC could be perceived of as the result of "regional" globalization, if one could create such a paradoxical term. However, the EC, particularly if the Maastricht Treaty[22] enters into force, is more than a "globalized market"

[14] See Carl Friedrich v. Weizsäcker, *Das ethische Problem der modernen Strategie*, 24 Europa Archiv 191 (1969); the term and concept is also preferred by Senghaas, supra note 3.

[15] See infra xxxx

[16] For a summary account of the history of the Bretton Woods system and GATT, see Wolfgang Benedek, *GATT—Allgemeines Zoll- und Handelsabkommen* no.1, in Rüdiger Wolfrum (ed.), *Handbuch der Vereinten Nationen* 201-202 (1991); Günther Jaenicke, *General Agreement on Tariffs and Trade*, 5 EPIL 20 (1983).

[17] 55 UNTS 187/55 UNTS 308.

[18] International Bank for Reconstruction and Development, 2 UNTS 134/606 UNTS 294 (amendment).

[19] 2 UNTS 39.

[20] OECD was created as the reconstituted earlier Organization for European Economic Cooperation (OEEC), 888 UNTS 142, and the respective OECD Convention together with the Protocol on Revision of the OEEC Convention was signed Dec. 14, 1960, 888 UNTS 180.

[21] For a concise account of the role and function of GATT, OECD, IBRD and IMF for development of the international economic order into a—at least partially—globalizing one see Ursula Heinz, *Weltwirtschaftsordnung*, in Wolfrum, supra note 16, at 1080 et seq.

[22] English text of the treaty in XXXI International Legal Materials (I.L.M.) 253 (1992).

and may eventually become something quite different: Although there is not yet a clear consensus with regard to what the status of the European Union is to be,[23] it cannot be denied that the Union in many ways has traits of a federal entity.[24] Union citizenship, obligatory judiciary, binding legislative powers by majority vote, and supremacy of EC law over domestic law are the major characteristics of this new supranational organization.[25] A common foreign and security policy—if it ever comes to be—added to the picture may force one to recognize that the EC is—to say the least—an ambivalent example of what one may understand by globalization. The "Fortress Europe" perception of the EC by observers from the outside world is evidence of not totally unfounded anxieties that the "globalized European market" may turn into a large but domestic market.[26]

To sum up this first section, we may conclude that the international system is, indeed, a rather complex one and that it is necessary to approach the issue of globalization of law, politics, and markets rather carefully in the light of its limited actual scope and in the face of the various countervailing forces. Particularly, the ambivalent nature of the EC has to be realized. Yet, there is enough evidence to allow discussion about globalization, i.e., the denationalization of markets, relevant laws, and politics in the sense of interlacing peoples and individuals for the sake of the common good, not the mere enhancement of national interests. And in view of the evidence at hand, we are able to draw on the experiences in the various areas where globalization has been realized beyond the mere adhortative level in assessing the impact of these processes on domestic legal orders, politics, and markets.

Strategies, mechanisms, instruments of globalization: Experiences from GATT, OECD, EC

The spectrum of strategies, mechanisms, and instruments of globalization extends from the establishment of international authorities with *exante* "legislative" and *ex post* "repressive" liability enforcement powers[27] to consensual coordination of globalization efforts and to decentralized market-oriented approaches. One may identify preferences for these means of globalization with two opposing credos: the belief in centralized planning or interventionist strategies and mechanisms on the one hand, and reliance on decentralized, liberal market-oriented strategies or mechanisms on the other hand. The propagation and application of these two basic approaches and a pragmatic mix of both means of globalization can be identified on the different levels of globalization, as well as in different subject areas. But we can also observe that market-oriented strategies, mechanisms, and instruments tend to be applied where the globalization of trade as a means of maximizing economic welfare for the greatest number constitutes the policy goal.[28] Intervention into the market is accepted only when there is market failure. Five areas of market failure can be identified:

- supply of public goods (public

[23] The president of the EC Commission, Jacques Delors, in a recent statement on the Maastricht Treaty has observed that those favoring a federated European state entity could feel comfortable with the treaty and the goal of a European union as provided for in the treaty, but those opposed to any kind of federated Europe could find themselves encouraged by the Treaty as well, see Jacques Delors, *Entwicklungsperspektiven der Europäischen Gemeinschaft*, in Aus Politik und Zeitgeschichte—Beilage zur Wochenzeitung das Parlament B1/93, 3 et seq.(at 4).

[24] For a thorough discussion of the various options of the further development of the EC under the Maastricht Treaty and the present legal and political status of the EC, see Rudolf Wildenmann (ed.), *Staatwerdung Europas?—Optionen für eine Europäische Union*(1991).

[25] Union citizenship was created by Article B of the Maastricht Treaty and regulated in more detail in Articles 8-8d EC Treaty revised. For a concise analysis of the other elements mentioned in the text, see William J. Davey, European Integration: Reflections on Its Limits and Effects.

[26] A related example is the recent introduction of new import tariffs on bananas from outside the EC, which contradicts the free trade attitude claimed by the EC, see Europäische Zeitschrift für Wirtschaftsrecht (EuZW), 75 (1993); for a discussion of the future political and trade posture of the EC and the "Fortress Europe" issue, see Roberto Zadra, *Towards a European Identity*, in Nanette Gantz & John Roper (eds.), *Towards a New Partnership—U.S.-European relations in the post-Cold War era* (1993), 55 et seq; James B. Steinberg, *The Case for a New Partnership*, ibid., 105 et seq.; Juan de Luis, *Economic Aspects*, ibid., 145 et seq. (reference to "Fortress Europe" at 147).

[27] For a discussion of the merits or disadvantages of *ex ante* harmonization by regulatory interventions and *ex post* measures as well as the positive results of "institutional competition" see Horst Siebert, *The New Economic Landscape in Europe*, 15 et seq.(1991).

[28] A strong argument for a moderate market-oriented strategy for the integration of the EC—a potentially "Schumpeterian event, an institutional innovation" is made by Siebert, supra note 27, (the quote ibid. at 13).

Intervention into the market is accepted only when there is market failure.

infrastructure such as parks and swimming pools);

- use of common resources (air, water, soil) in case of negative externalities (abuse of common resources at the expense of the community);
- increasing returns to scale (increased production, reduced prices leading to a natural monopoly);
- lack of future markets because of moral hazards; and
- general problems of income distribution, social security, etc., where political, not market, determination is considered necessary.[29]

But where other considerations such as the protection of the environment or underdevelopment dominate the determination of policy goals, the choice of means seems to tend towards interventionist concepts. Thus international approaches to a restructuring of the world economic order with a view to overcoming underdevelopment—the NIEO—were basically non-market-oriented.[30]

There are several reasons for this difference in choice and preference of globalization means. First of all, the market model meets with a fair amount of distrust when it comes to the problem of securing social values attached to what traditionally is considered a "public good" in contrast to securing "private goods."[31] Free-trade conditions are widely accepted as advantageous to secure the provision of private goods for adequate prices. Similar considerations apply to "common resources"—for example, clean air, water, and soil—access to which is traditionally considered to be free, i.e., they do not have to be paid for and are therefore seen as non-marketable goods.[32] Free access to common resources leads to overexploitation[33] and thereby to negative externalities, i.e., the costs of overexploitation are burdening the taxpayer, not the beneficiaries of overexploitation. Central regulation to achieve the preservation and thereby the further availability of common resources is considered the adequate means. A second reason is, that in view of the overwhelming dimension of the perceived threats to common resources such as the environment, the market model approach would appear not to guarantee swift and effective redress: The decentralized decision-making process of the market is believed to be unable to provide for the necessary uniformity of concerted efforts necessary to cope with transborder and, even more so, global threats of the destruction of common resources. These arguments amount to contending that in the area of common resources there is *per definitionem* no market mechanism that could be set to work. From the point of view of pure economic theory, this is not true.[34] According to one school of thought, the fallacy of considering common resources not to be tradeable lies in the fact that it is not the public good (e.g., clean air) as such that is at issue but the right to use it. This right, once allocated to a user for an adequate price, becomes a private good and the costs for it become "internalized."[35] Under conditions of market competition, the user of a common resource comes under pressure to reduce the amount of internalized cost, i.e., to reduce the use of the resource. This reduction of the use of the common resource turns into a reduction of, for instance, air pollution. As an additional advantage, the user provides for technological innovation as a means of reducing the costs for the use of a common resource—a typical achievement of the laws of the market.[36] Another, probably more realistic, school of thought does not deny the necessity of certain regulatory measures, but is inclined to accept a decentralized scheme of regulation.[37] For instance, if states are left free to set their own standards of environmental protection, a process of

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[29] See R.W. Boadway & D.E. Wildasin, *Public Sector Economics*, Chapter 1, passim (2nd ed.1984).

[30] For this kind of approach, see Brun-Otto Bryde, *Von der Notwendigkeit einer neuen Weltwirtschaftsordnung*, in Brun-Otto Bryde, Philip Kunig & Thomas Oppermann (eds.), *Neuordnung der Weltwirtschaft* 29 (1986); for a market-oriented approach in the same context, see Thomas Oppermann, *Über die Grundlagen der heutigen Weltwirtschaftsordnung*, ibid., 11.

[31] For a pertinent discussion of the notions of "public" and "private" goods in the context of environmental policies, see Gerhard Prosi, *Statische und dynamische Effizienz der Umweltpolitik*, 66 Bayerisches Landwirtschaftliches Jahrbuch 259 (1989).

[32] Prosi, supra note 31.

[33] Prosi, supra note 31, at 260.

[34] See Siebert, supra note 27, 32 et seq., who discusses a market-oriented approach, based on the concept of institutional competition, to a European environmental policy; also Prosi, supra note 31, passim.

[35] See Prosi, supra note 31, 260-261.

[36] Prosi, supra note 31, 269 et seq.

[37] A clear example in point is Siebert's study "The New European Economic Landscape," supra note 27.

"institutional" competition would still ensue. Although under the principle of origin, goods with lower environmental quality remain freely tradeable, the level of environmental standards will still improve because—given the acceptance of an improved environment as a high social value—the goods conforming to higher standards of environmental quality will be more competitive.[38] Rigid central *exante* regulations, on the other hand, will not provide for incentives to strive for improved environmental standards and respective innovative technology.[39] But even more important in an international environment, lacking a central legislative authority, for all practical reasons the achievement of maximum or optimum regulations does not seem a realistic assumption.

The theoretical dispute over the validity of these and similar strategies cannot be pursued here any further. Instead, experiences at the different levels and subject areas of globalization processes will be looked at: first, the globalization of markets in the area of free trade and, second, the strategies and instruments used by international organizations like the GATT, and the OECD, on the one hand, and the EC, on the other.

Viewed from the perspective of the original concept of GATT, this treaty embodies the core principles of liberal market theory.[40] The most-favored-nation principle, reduction of customs tariffs, the principle of non-discrimination, and removal of non-tariff trade barriers are to be implemented with the ultimate goal of increasing the world trade volume, raising the standard of living, and providing for full employment (Preamble, para. 1 GATT). The scope of GATT that applies *de iure* to well over 100 states and *de facto* to roughly another 30 states, is restricted to trade in goods. Services and movement of capital are not covered by the agreement and negotiations on questions of transborder services are carried out formally outside the GATT.[41] But even with these limitations on its scope, GATT's global reach is without question. This is also borne out by recent trade statistics that show that about 85 percent of the world's trade takes place within the realm of GATT.[42]

The globalization of markets by a basically deregulatory approach, however, in the fields of customs tariffs, non-tariff trade barriers, and non-discrimination has been modified over the decades in favor of strengthening the global reach of GATT. Although not in conformity with the basic market philosophy of GATT, exceptions to the most-favored-nation principle have been granted for member states entering customs unions or free trade areas or regional arrangements of a similar kind but falling short of the strict regimes of the former.[43] Parties to such arrangements are not obliged to extend the internal advantages to third states. Another exception to the most-favored-nation principle is the acceptance of preferential treatment, e.g., for underdeveloped countries.[44]

These regulatory deviations from the pure free market philosophy are being justified by reason of their directly beneficial effects on the countries or regions concerned and their indirect promotion of world trade at large by strengthening the economies of the privileged states.[45] It may be noted here, however, that the establishment of the EC did not meet with the unanimous consensus of the GATT community. It was not privileged under the exception to the most-favored-nation principle mentioned before. GATT members only took notice of the EC, which has not become a member of GATT but is representing the EC member states in the GATT decision-making process.[46] Other deviations from the free market concept are temporarily allowed under the so-called escape clause (Art. XIX GATT)—a bow to the principle of sovereignty in that states are accorded the right in cases of

[38] Siebert, supra note 27, 32 et seq.

[39] Prosi, supra note 31, 269.

[40] For a summary description of the basic GATT principles, see Jaenicke, supra note 16, at 22-26; Benedek, supra note 16, nos. 9-20 at 203-207.

[41] Benedek, supra note 16, no. 14, 205.

[42] Benedek, supra note 16, no. 3, 202; Oppermann, supra note 30, at 13, seaks of only 80 percent.

[43] For more details, see Jaenicke, supra note 16, at 23; Benedek, supra note 16, no. 18, at 206.

[44] These preferences are granted by the industrialized countries under the Generalized System of Preferences, see Jaenicke, supra note 16, at 23; Benedek, supra note 16, no. 18, at 206.

[45] With regard to this preferential treatment, see Oppermann, supra note 30, at 18-19, who takes a positive view of the underlying policy determination, but emphasizes that the preferential treatment should be seen as a temporary exception to the basic market-oriented philosophy of GATT, not as a structural change towards a new international economic order.

[46] See Benedek, supra note 16, no. 18, at 206 and no. 3, at 202; Jaenicke, supra note 16, at 20.

The complex of goals and principles of the EC constitute the core credo of a market-oriented strategy.

necessity to give priority to national interests over GATT obligations.[47] The general regulatory inroads made on the free market concept by reason of environmental concerns will be dealt with in the next subsection.[48]

The OECD presents pretty much the same picture. Its policies (or strategies) are defined in Article 1 of the OECD Convention. According to this provision, OECD's policies are designed to "achieve the highest sustainable economic growth and employment and a rising standard of living in member countries, while maintaining financial stability, and thus to contribute to the development of the world economy" (para. a). Its global aspirations are particularly evident from the wording of Art. 1 paras. b and c, which require the OECD's policies "to contribute to sound economic expansion in member as well as non-member countries in the process of development" and "to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations." In implementing these policies the OECD has engaged in a sweeping program of liberalizing trade by dismantling quantitative restrictions, but it has also included the liberalization of capital movements and invisible transactions.[49] A major focus of the OECD's activities has been to mitigate adverse effects on member and non-member states' economies and free trade on account of the energy (oil) crises.[50] Thus the OECD's scope of activities *ratione materiae* is broader than that of the GATT, but is more limited than the GATT *ratione personae*. It comprises 19 northern, western, and southern European countries and five non-European countries (United States, Canada, Japan, Australia, and New Zealand).[51] The OECD thus comprises the core of the industrialized countries, which also form the backbone of industrialized countries in the GATT. The EC is not formally a member of the OECD but together with EFTA participates in the work of the OECD on the basis of an express provision of the OECD Convention (Art. 13) and a Supplementary Protocol No. 1 to the Convention (EC) and by a Ministerial Resolution (EFTA). The characteristic feature of OECD's work is that it is predominantly based on consensual coordination of the sovereign member and non-member states' policies. Lawmaking and strict enforcement by the organization have played a decreasing role.[52] Yet the achievements in the field of trade liberalization have been high. It is no exaggeration to state that the work of OECD has made a considerable contribution to the globalization of markets. The special issue of trade and the environment under the auspices of the OECD will be treated below.[53]

The overall goal of the European Community is a high degree of economic and ultimately political integration. The preamble and Art. 2 of the EEC treaty[54] contain a rather long list of goals and tasks set for the organization. The Single European Act[55] and the Maastricht Treaty[56] have added even more tasks and competences, for that matter, all aiming at the dynamic integration of the member states. Because of the dynamics built into the integration process, the EC has potentially comprehensive jurisdiction over all areas of economic, social, and cultural activities within the EC territory.[57]

The overall aims for establishing, first, the common and, second, the internal market are specified in the so-called four freedoms (freedom of movement of goods, services, persons, and capital) and in the provisions on the removal of customs barriers, free competition, and the observance of the principle of non-discrimination, an overriding principle applicable in the process of implementation of the other basic goals. The complex of goals and principles of the EC—like those of the GATT and the OECD—again constitute the core credo of a market-oriented strategy. But this complex of goals and principles is much larger—

[47] See Jaenicke, supra note 16, at 23.
[48] See infra xxx
[49] See Article 2 of the OECD Convention; also Hugo J. Hahn, *Organization for Economic Cooperation and Development*, in 5 EPIL 214 (at 218) (1983).
[50] See Hahn, supra note 49, at 216.
[51] See Hahn, supra note 49, at 214.
[52] See Hahn, supra note 49, at 221.
[53] See infra xxx
[54] 298 UNTS 11; for the text as amended until the signing of the Maastricht Treaty (not yet in force), see United Kingdom Treaty Series (UKTS) 47 (1988).
[55] XXV I.L.M. 506 (1986).
[56] XXXI I.L.M. 253 (1992).
[57] For more details, see Davey, supra note 25, xxxx

or even unlimited—in scope than that of the other organizations.

The process of implementation of the four freedoms may properly be called one of "globalization" in a figurative sense: The formerly domestic markets are becoming global *ratione personae* and *materiae*. The EC has also engaged in enhancing the globalization of markets—much in line with GATT and OECD—in that it has opened the EC market to third states, at least to a certain extent. The several Lomé Conventions[58] have granted preferential treatment to formerly dependent areas of member states. Recent agreements with former member states of COMECON (Poland, the Czech and Slovak Republics, and Hungary) have granted these states access to the EC market.[59] Although not in line with pure market theory, these accords and agreements tend to strengthen the future full participation of these countries in a global market—universal or regional. The policy of globalization is also followed in the EC by the establishment of the European Economic Area,[60] i.e., the extension of most of the liberal trade regime of the EC to the EFTA area except for Switzerland.[61]

However, the EC did not solely rely on the mechanisms of a liberalized market in achieving the goals of the community. It used its broad legislative regulatory powers, on the one hand, to enhance and accelerate the harmonization of the laws within the EC, not leaving it to "institutional competition."[62] On the other hand, it legislated in order to set common standards securing unimpaired conditions of free competition or to further technological development in the EC, as, for instance, in the area of telecommunications[63] and in other fields. While legislative intervention aimed at maintaining fair conditions for competition is clearly in line with modern market theories, regulations (mainly directives, but also programs of subsidies) to further the technological or other industrial capabilities of the EC are clearly of a central authority-backed interventionism nature.[64] A complete deviation from the principles of market-oriented globalization of the domestic markets of the member states has taken place in the area of agriculture. The agricultural "market" constitutes a highly regulated, actually non-market, system. It is neither globalized nor based on the principles of free-market theory. It is a "rent-seeking" and protectionist subsystem of the EC.[65] The regulatory powers have also been extensively used in the cause of environmental protection—an area to be covered further below.[66]

The overall picture of the process of globalization within the framework of the EC shows that both the mechanisms of a free market and the instruments of central regulation, backed by central enforcement authorities (commission and court) have been applied. In this regard, the EC differs from the other organizations mentioned, particularly from the OECD, in the way it has strived for the globalization of intra-community commerce. In some areas, it has acted more like an emerging domestic market than an open, globalizing one. On the other hand, the steps taken to widen the scope of the EC market with regard to developing countries, some former Socialist countries, and to EFTA is evidence of the globalizing thrust of the EC enterprise.

In the first section of this article, it was pointed out that problems of genuinely global dimension have emerged in the field of environmental protection. The international community has come to realize that the abuse of the natural resources of the globe (such as the atmosphere, air, water, soil, the rain forests, and the

[58] EEC-ACP Convention of Lomé of Feb. 28, 1975 (Lomé I), XIV I.L.M. 604 (1975); EEC-ACP Convention of Oct. 31, 1979 (Lomé II), XIX I.L.M. 327 (1980); EEC-ACP Convention of Dec. 8, 1984 Lomé III), XXIV I.L.M. 588 (1985).

[59] For the text of these agreements, which have entered into force as of March 1,1992, see EC O.J 1992 No. L 114, L 115, and L 166. 1 et seq.

[60] EEA Treaty of May 2, 1992; text reproduced in Revue Suisse de Droit International et Européen (RSDIE), 339-423 (1992).

[61] See Archiv der Gegenwart (AdG), 37394 A (1992).

[62] On "institutional competition" as a means of harmonization of the legal orders of the EC members, see Siebert, supra note 26, 15 et seq.

[63] See EC Council Directive Concerning the Pursuit of Television Broadcasting Activities, 32 Official Journal (O.J.) EUR.COMM. (No. L 298) 23 (1989), adopted Oct. 3,1989; EC Draft Directive on the Adoption of Standards for Satellite Broadcasting of Television Signals COM (91) 242 final—SYN 350, O.J. EUR. COMM. (No. C 194/20) of July 25,1991, and Memorandum of Understanding; also the EC Directive on MAC/HDTV 86/529/EEC of Nov. 3,1986; Cate, supra note 9.

[64] The example of the EC measures adopted to introduce and promote the MAC/HDTV standard are telling in this regard, see supra note 63.

[65] See Ernst Ulrich Petersmann, *Umweltschutz und Welthandels- ordnung im GATT, OECD- und EWG-Rahmen*, 47 Europa Archiv 257 (at 258).

[66] See infra xxx

living resources, to name but the most important elements of the environment) has reached a level where protection activities by individual states are not commensurate to the existential threats to the survival of Space Ship Earth. Production and consumption of goods necessarily draw on the natural resources and thus have a negative effect on the environment.[67] This is of no concern as long as these resources are amply available or are renewable. But once these resources, particularly fresh air, clean water, etc., become scarce because of overexploitation, production of, trade with, and consumption of these goods becomes a matter of public concern. Overexploitation of common resources is the result of the fact that their use traditionally has been considered to be necessarily free.[68] Common resources, as has been mentioned before, are not held to be marketable goods. In principle, it is possible to privatize their use and thereby subject them to the laws of the market, i.e., to set an adequate price for their use and thus internalize the costs at the producers' or consumers' level. Practice shows, however, that for whatever reasons, states and also the international community at large tend to intervene in the market and bring protectionist regulation to bear. "Protectionist" measures in a double sense: Domestic environmental measures are used to literally protect the environment, but they are sometimes also used as unilateral measures to enforce national standards of environmental protection on third states to the effect that trade with those third states may be impaired in favor of domestic goods.[69] In other words, domestic environmental regulations can and often do collide with the laws of a free market. Yet economic theory teaches us that discriminatory domestic protective measures even for the high goal of environmental protection as a rule do not result in optimum solutions.[70] Based on the premise that environmental protection and international commerce are not necessarily antagonistic goals,[71] GATT, OECD, and the EC have tried to work out regulatory régimes for their respective realms either by a trial and error settlement of the conflicting interests[72] or by relevant laws or conventions.[73] The principal instruments and regulatory principles applied are the "polluter pays" principle and imposing *non-discriminatory* charges, taxes, and various economic incentives to induce producers and consumers to abide by environmental standards and to engage in innovative technologies or in the reduction of uses of scarce natural resources.[74]

Based on a number of rulings rendered in dispute settlement proceedings, the GATT has established a clear distinction between permissible national environmental regulations, i.e., non-protectionist or non-discriminatory unilateral measures, as distinct from protectionist discriminatory ones.[75] The essence of these rulings is that as long as national environmental protection measures (penalties, charges, taxes, etc.) are applied equally to domestic and imported goods, such measures are not considered to impede on free trade. The legal basis for these rulings is Art. III GATT. The rationale of the rulings in related cases—e.g., the U.S./Mexico tuna fish case[76], the U.S./Canada herring case[77], the EC, Canada, Mexico/U.S. Super Fund Act

[67] See Petersmann, *Umweltschutz und Welthandelsordnung*, supra note 65, 257.

[68] See Prosi, supra note 31, 259.

[69] On environmental protection and "green protectionism," see Petersmann, *Umweltschutz und Welthandelsordnung*, supra note 65, at 258 et seq.; with regard to the same phenomenon in GATT see id., *International Trade Law and International Environmental Law*, in 27 Journal of World Trade 1993, 43 et seq.(at 78).

[70] See Petersmann, *Umweltschutz und Welthandelsordnung*, supra note 64, at 258.

[71] Prosi, supra note 31, 272.

[72] See Petersmann, *Umweltschutz und Welthandelsordnung*, supra note 65, at 262.

[73] With regard to the EC see Ludwig Krä mer, *Community Environmental Law—Towards a Systematic Approach*, Yearbook of European Law 151 (1991), the author points to some 200 legal instruments, while the European Parliament even refers to 445 legislative acts, 196 directives, 40 regulations, 150 decisions, 14 recommendations and resolutions, see EP O.J. 1991 C 183/297, cited also by Krämer at 151 note 1.

[74] On these instruments and principles see Petersmann, *Umweltschutz und Welthandelsordnung*, supra note 65, at 257; id., *International Trade Law*, supra note 69, passim; also Eliza Patterson, *GATT and the Environment—Rules Changes to Minimize Adverse Trade and environmental Effects*, in 26 Journal of World Trade 1992, 99 et seq.; James H. Mathis, *Trade Related Environmental Measures in the GATT*, in Legal Issues of European Integration 1991/2, 37 et seq.; Prosi, supra note 31, at 261, 263 et seq; Siebert, supra note 27, at 32 et seq., who in addition emphasizes the country-of-origin principle.

[75] See Petersmann, *Umweltschutz und Welthandelsordnung*, supra note 65, at 258 et seq.

[76] Text of the Panel Report, XXX I.L.M. 1598 (1991); for an analysis of the case, see Carol J. Beyers, *The U.S./Mexico Tuna Embargo Dispute: A Case Study of GATT and Environmental Progress, in 16 Maryland Journal of International Law and Trade, 229 (1992).*

[77] Panel report adopted March 22,1988,

case[78]—has also been applied to the problem of reconciling implementation of the 170 or so conventions on environmental protection concluded outside the GATT.[79] The goals pursued by these conventions were held by the GATT to be beneficial for both the exporting and the importing country. As long as the obligations ensuing from the conventions are realized in a non-discriminatory way and means and ends are proportionate, respective measures are deemed to be compatible with the GATT.[80] Furthermore, GATT encouraged mutual recognition of technical standards of equivalent efficiency. Subsidies for strictly environmental purposes were accepted as permissible. Thus GATT has set an example of reconciling environmental concerns with the principles of free trade, at least in principle. Thereby, GATT has added a dimension of global environmental responsibility to its global aspirations in the field of commerce.

The OECD has followed pretty much the same policies.[81] After lengthy deliberations the OECD Council of Ministers adopted in 1991 a Joint Report on Commerce and Development that recommended a revision of the 1972 Guidelines for the Protection of the Environment and an Open Trade System.[82] OECD relies on the principles of "polluter pays" and environmental damage prevention, charges, taxes, and incentives to further the cause of environmental protection and at the same time preserve an open market. But it also holds against protectionist measures intended to make up for disadvantages ensuing from particularly high environmental standards that impair competitiveness, a course not quite in line with a pure environmental stance as it "punishes" states upholding particularly high standards of environmental protection.

In the field of environmental protection the EC faces the same basic problems of reconciling environmental goals and free trade aspirations as the GATT and the OECD. However, the EC's approach to the problem has been (and still is) a very different one. The, in every sense of the word, global scope of environmental threats is evidently perceived as being so overwhelming that neither pure market mechanisms such as competition over the environmentally best products fueled by consumer preferences, nor national regulation as the basis for "institutional" competition between the different legal systems are considered adequate to cope with the environmental threat effectively. A rather illuminating statement of the regulatory credo of the EC is found in a recent article by a lawyer of the Commission of the EC who unequivocally states:

"There are transnational environmental problems. Pollution of the Atlantic, the North, the Baltic, or the Mediterranean seas, air pollution, the disappearance of fauna and flora species, and other environmental problems *cannot be resolved by national or regional activity alone.* International conventions are not fully enforced; *they lack the necessary legal authority on the one hand and effective enforcement procedures on the other."*[83] One could hardly imagine a more typical paraphrasing of the EC's philosophy (which does not apply only to the environment): Globalization the EC way is the only effective means to solve imminent problems (here in the environmental field), international and national approaches are dismissed, and so are economic instruments such as the polluter-pays principle. Although referred to in the treaty in one instance (Art. 130r para. 2) "the principle [as it] stands at present,... is, without concrete measures indicating what shall be paid for, a political guideline."[84] Economic instruments may be applied by the member states, and they are encouraged to do so, but they are of no concern to the EC as such.[85]

The body of environmental law is contained in the treaty (Art. 130r—objectives—, 130s and t), in international conventions to which the EC is a party, and in a host of secondary laws (regulations and directives).[86] As

Basic Instruments and Selected Documents (BISD) 35 S/98 et seq.

[78] Report adopted June 17,1987, BISD 34 S/136 et seq.

[79] See Petersmann, *Umweltschutz und Welthandelsordnung*, supra note 65, at 262 et seq.

[80] See Petersmann, *Umweltschutz und Welthandelsordnung*, supra note 65, at 258 et seq.

[81] See Petersmann, *Umweltschutz und Welthandelsordnung*, supra note 65, at 264-265.

[82] See Petersmann, *Umweltschutz und Welthandelsordnung*, supra note 65, at 264.

[83] Quoted from Krämer, supra 73, at 151, emphasis added.

[84] Quoted from Krämer, supra note 73, 162.

[85] On the foregoing see Krämer, supra note 73, at 161-162.

[86] See Krämer, supra note 73, at 153 et seq., who emphasizes those areas of EC activity, which in the understanding of globalization assumed in this paper show a distinct global dimension.

The EC strongly believes in central law making and central enforcement.

EC law, these rules and regulations take precedence over national law of the member states,[87] but national law is allowed to set higher standards of environmental protection as long as these are compatible with the treaty.[88] But even this reference to the treaty, i.e., the principle of non-discrimination and free trade, has been modified in practice by the ECJ, for instance, in the Danish Bottle Case.[89] Although the Danish national law restricting the import of non-returnable containers (bottles in this case) was considered to constitute a trade impediment by the ECJ under Art. 30, the court upheld the Danish ban on such bottles because of overriding environmental concerns, the measure being in itself non-discriminatory, not arbitrary, and proportionate.[90]

As in the case of the geographic extension of EC's trade laws to non-member states in the cause of globalization, EC's environmental laws aim at globalization in two ways: They are aimed not only at preventing and reducing environmental damages within the EC, but they are also directed towards global goals like stopping the depletion of the ozone layer and other environmental hazards of global dimensions.[91] Furthermore, EC law provides the possibility for individuals to have resort to national courts and ultimately to the European Court of Justice (for instance, via Art. 177) in cases where directives are not properly transposed or not complied with otherwise.[92] Thus individuals and other economic agents are directly involved in the enforcement of environmental rules and standards irrespective of national borders and national status. This is a major difference from the GATT system, which gives primary consideration to producer interests in a rather mercantilistic manner, while the EC recognizes that the principles of free trade and environmental protection create rights for consumers and EC market citizens that have to be protected by the national courts and by the ECJ if called upon by the national courts under Art. 177 EC Treaty.

The EC deals with the environmental problems predominantly in a regulatory way. The role of the domestic legal orders and domestic economic approaches to environmental protection are largely reduced to a supplementary role. The EC strongly believes in central lawmaking and central enforcement by the authority of the commission and ultimately the ECJ. The principles of free trade, although also upheld in principle in the field of environmental protection, have suffered major modifications, environmental protection having been given priority in a number of major cases.[93] This certainly has ramifications for the external commercial relations of the EC but also for the national economic orders of the member states. From this perspective, the EC is globalizing in the environmental field internally as well, but with the further result of behaving more like an emerging large domestic market of a federal entity than as a globalizing agent of an open, free world market.

Implications of different processes of globalization for domestic law, policy choices

Processes of globalization have been taking place and are still in progress. The strategies, mechanisms, and instruments applied on the different levels of globalization are market oriented to different degrees, mainly depending on the subject area being globalized and on the political feasibility of replacing market-induced strategies of globalization by central law making and enforcement. From the preceding overview and analysis of the experiences of GATT,

[87] In this respect, EC environmental law follows the general principles governing the relationship between EC law and domestic law as enunciated by the ECJ in the leading case Costa v. E.N.E.L. [1964]ECR 585; see also Krämer, supra note 73, at 163.

[88] Setting higher domestic standards, as a rule, requires authorization by Community legislation, which it normally provides. In exceptional cases, more stringent domestic standards may also be provided without prior authorization provided that they are compatible with the higher EC law; see Krämer, supra note 73, at 164.

[89] See Commission v. Denmark, Case 302/86, [1988] ECR 4607; see also Petersmann, *Umweltschsutz und Welthandelsordnung*, supra note 65, at 265-266.

[90] See Petersmann, *Umweltschutz und Welthandelsordnung*, supra note 65, at 266.

[91] See Krämer, supra note 73, at 153.

[92] On enforcement of EC environmental law, particular on rights of individuals to participate in the enforcement process, see Krämer, supra note 73, at 168 et seq.

[93] For a conspicuous example, see the Danish Bottle Case, supra note 89.

To think and act globally means to focus on societies as a whole, not on interest groups.

OECD, and the EC it seems to be quite obvious that on all levels but the EC level, a mix of market-oriented strategies and consensual coordination of efforts with some regulatory/interventionist touches dominate. While this is also true with regard to the EC in the area of trade, a heavy reliance on the regulatory approach can be observed in the area of the protection of the environment with clear repercussions for the principles of free trade and their implementation EC-wide and beyond, as well as domestically. Before examining the implications of these general findings for preferences of policy choices, the purely legal implications of the two basic approaches to globalization for the domestic law of the states concerned shall be looked at.

The GATT and OECD approaches, hereafter referred to as the international model, rely on the globalization, i.e., harmonization and de-nationalization of the domestic legal orders, through international agreements that oblige the states parties to transpose the international legal obligations into domestic law. This means that the actual process of globalization is left to the sovereign decision-making authority of the states or their respective legal provisions on the relationship between international law and the domestic legal order.[94] In addition, the globalization is left to the market agents whose commercial practices under the international regime mold the emerging global order. Particularly international arbitral dispute settlements under the terms of the international and nationalized rules of international commerce (GATT rules, OECD rules, UNCITRAL, Codes of Conduct, etc.) and environmental protection contribute to the growth of a global *lex mercatoria*, which is mainly informed by the interests and needs of the actual participants in the economic transactions.[95] Thus there is no immediate effect on the domestic law by international rule making and standard setting under the auspices of the international model. However, the process of globalization is less assured, since state sovereignty remains an incalculable intervening variable.

Under the EC or supranational model, the effect of globalizing lawmaking is, in line with a monistic approach to the relationship between international/supranational and domestic law, an immediate one.[96] The principle of the supremacy of EC law means that domestic law is set aside or, in the case of directives, domestic lawmaking is predetermined by the binding goals set by the directives. Thus, there is no room for discretion on the part of the domestic lawmakers. The immediate effect of the supranational law as the globalizing agent is independent of the sovereign will of the member states and it is backed up by the enforcement powers of the ECJ. Of course, the picture drawn in the preceding considerations is rather idealistic. There is some influence by the member states on these immediate effects of EC lawmaking as a tool of globalization in that the lawmaking is ultimately resting on the consent by the member states' representatives on the Council of Ministers. This influence is mitigated, however, once again by the fact that according to the provisions of the Single European Act (for instance, Art. 100a), decisions can be taken by majority vote. In essence, what all this means is, that the harmonization or globalization/de-nationalization of the market, the law and politics within the EC is, as a rule, a swift and effective process, particularly in the area of environmental protection. But

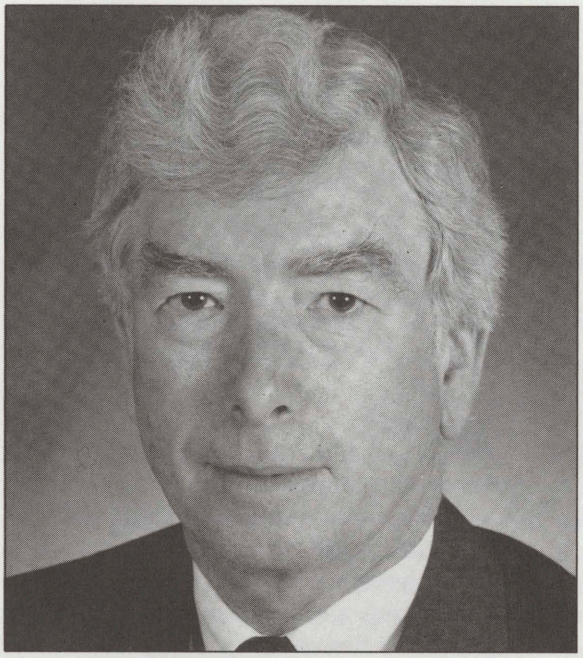
[94] On this approach, according to the dualist concept of the relationship between international and domestic law, see Dahm, Delbrück & Wolfrum, supra note 2, at 98 et seq.; Partsch, *International Law and Municipal Law*, 10 EPIL 238.

[95] See Ernst A. Kramer, *Globalisierung der Wirtschaft—Internationalisierung des privaten Wirtschaftsrechts*, in Österreichisches Bankarchiv (?BA) 9/91, 621 et seq., pointing out the various methods of unifying domestic law; on the emerging new *lex mercatoria*, ibid., at 625 with further references.

[96] Although the relationship between the law of supranational organizations such as the EC and the internal law of the member states—because such organizations and their respective law are considered to be of a different kind than inernational law—it has to recognized that supranational organizations are also based on *international treaty law*, the status of which within the internal legal order of the parties to the founding treaty has to be determined, and this is done so, in the case of the EC, along the lines of a monistic approach: At least part of the law of the EC is directly applicable in the member states; see the case of Costa v. E.N.E.L., supra note 87.

it is unique in terms of the necessary political preparedness of the member states to accept the supranational authority wielded by the EC.

When it comes to the question of choices, i.e., what course of action is preferable—the supranational approach or the international model—a number of political decisions have to be made. First, it has to be decided that globalization is a desirable end. Considering the urgency of resolving the vexing problems mentioned in the first part of this article, it appears that a global approach to the serious global problems of our time is without real alternatives. Second, it has to be decided which means of achieving the necessary degree of globalization of problem perception and of problem-solving capabilities are preferable: Are slightly modified market-oriented strategies preferable over central interventionist ones? Here the answer is difficult. There are persuasive arguments, particularly on the part of economic theory, in favor of a modified market approach. First of all, reliance on *ex ante* central lawmaking has to rely on the assumption that the central authorities—the politicians—own the better quality insight and knowledge to legislate in the right way for reaching the better solutions than the decentralized market process would bring about. Economic theory provides serious evidence that central regulation in the long run arrives at less than *pareto-optimal* solutions despite possible short-term higher efficiency.[97] Third, the supranational approach with its inherent inclination towards using *ex ante* regulation as the tool of globalization presupposes a degree of political homogeneity and basic consensus, which is not the rule in the international system at large. Thus it seems a tenable position to take that in the long run a market-oriented approach along the lines of what is called in Europe, particularly in Germany, the social-ecological market economy is the best choice. But it is such only if certain political conditions are met:



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- States have to be ready to transpose international obligations faithfully into the domestic legal orders;
- States have to forego the option of unilateralism, whether with regard for protectionist temptations or overzealous goals of enforcing free trade or standards of environmental protection beyond their domestic realms;
- States have to gear their domestic legal orders to a swift and effective reception of the norms of international or rather of the emerging global law, and, particularly, courts have to be bound to have due regard for the norms of international/global law; and
- States have to ensure that globalization of markets, law, and politics becomes effective for societies and individuals at large, not only for specific market agents.

This is probably the most important and difficult adaptation of the domestic legal order and domestic politics because it requires an exchange of the basic paradigms of traditionally market-oriented (capitalist, if you want to call it that) societies. To think and act globally means to focus on societies as a whole, not on some powerful interest groups. A lasting cooperative relationship between the United States and the EC (and Japan as well) seems to depend on whether these powerful actors in the emerging global order will be able to achieve this resetting of the leading paradigms of their respective value systems. Whether the EC will really become Fortress Europe as has been suggested by some political observers, is an open question. Whether the United States will grow into the role of a truly global leader rather than remaining an international hegemonic power (wholesome as the existence of at least one powerful pillar of the international system actually is) is a question just as open.

[97] Boadway & Wildasin, supra note 29, at 5.